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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 425

CITY OF DALLAS, TEXAS, PETITIONER

v.

TUBBS MANUFACTURING COMPANY, INC., AND UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15–22) is not yet reported. The oral opinion of the District Court (R. 87–89)[1] was not reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 29, 1957 (Pet. 23–24). Petition for rehearing was denied August 5, 1957. The petition for a writ of certiorari was filed September 3, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

[1] Record references herein are to the printed record in the Court of Appeals.

QUESTION PRESENTED

Whether in the case of an insolvent taxpayer the debt due the United States for unpaid taxes is entitled to priority in payment, under Section 3466 of the Revised Statutes, over the tax claim of the City of Dallas.

STATUTE INVOLVED

Revised Statutes:

> SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

(31 U. S. C. 1952 ed., Sec. 191.)

STATEMENT

This action was originally brought by the Exchange Bank & Trust Company against the Tubbs Manufacturing Company in a Texas State court (R. 1–15) to recover judgment for the unpaid balance of a debt, to foreclose its chattel mortgage lien, and for appointment of a receiver and sale of the mortgaged property to satisfy the judgment. A receiver was appointed (R. 16–24), the debtor being then insolvent (R. 52).

The United States, having been made a party by intervening petitioner Briggs Weaver Machinery Company, had the action removed to the United States District Court for the Northern District of Texas (R. 38–39), where the United States (R. 41–46), the First National Bank in Dallas (R. 47–49), and the City of Dallas (R. 54–59) also asserted claims against the debtor. The receiver sold the property of the debtor free and clear of liens for a total sales price of $6,349, and after deducting fees and expenses deposited the balance of $5,118.94 in the registry of the District Court (R. 68–69).

Asserted against this amount were five claims (Pet. 16, R. 69–84):

(1) The Exchange Bank & Trust Company had chattel mortgages dated November 19, 1953 (recorded November 25, 1953), and June 30, 1954 (recorded July 14, 1954), securing claims in the net amount of $1,436.57 on that portion of the assets which were sold for $5,059;

(2) The First National Bank in Dallas had a chattel mortgage dated November 2, 1955, registered with the Texas Highway Department on November 17, 1955, on a 1956 Ford truck, which was sold for $890, to secure its claim in the net amount of $963.62;

(3) The Briggs Weaver Machinery Company had a chattel mortgage dated April 28, 1955, recorded May 3, 1955, on that portion of the assets which was sold for $400, to secure its claim in the net amount of $2,466.71;

(4) The City of Dallas had levied and assessed personal property taxes against the Tubbs Manufactur-

ing Company for the year 1955 on September 12, 1955, in the amount of $62.63, and for the year 1956 on September 4, 1956, in the amount of $72.56;

(5) The United States had claim for excise taxes in the amount of $5,503.95, and for withholding taxes in the amount of $3,315.77, which had been assessed against the Tubbs Manufacturing Company on August 15, 1956, and notice of lien filed on October 15, 1956.

The funds on deposit not being sufficient to pay all claims, the District Court held that the claim of the United States was entitled to priority under Section 3466 of the Revised Statutes, and entered judgment for the United States for the full amount on deposit (R. 87–92). On appeal, the Court of Appeals held that (1) the claims of the mortgagees had priority over the tax claim of the United States, but not over the tax claim of the City of Dallas; (2) the tax claim of the United States had priority over that of the City. Accordingly, it directed the District Court to enter judgment awarding priority to the respective mortgagee claimants, subject to payment of the City's taxes, the balance to be paid to the United States (Pet. 16–24).

ARGUMENT

The United States not having petitioned for a review of that part of the Court of Appeals' judgment awarding priority to the chattel mortgage claimants, the single issue presented by this petition is whether under Section 3466 of the Revised Statutes, *supra*, p. 2, the tax claim of the United States against the

insolvent debtor is entitled to priority over the tax claim of the City of Dallas. That issue has been settled by numerous decisions of this Court, with which the decision below is in complete accord. There is no conflict, nor any other reason for further review.

1. Section 3466 of the Revised Statutes prescribes that "Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied * * *." The priority accorded the United States in the collection of claims against an insolvent is by the terms of the statute absolute. In a long line of cases this Court has repeatedly held that an adverse lien which has not become both specific and perfected before the debtor becomes insolvent cannot serve to deprive the United States of its priority right.[2] *United States* v. *Gilbert Associates*, 345 U. S. 361; *Illinois* v. *Campbell*, 329 U. S. 362; *United States* v. *Waddill Co.*, 323 U. S. 353; *United States* v. *Texas*, 314 U. S. 480; *New York* v. *Maclay*, 288 U. S. 290; *Spokane County* v. *United*

[2] In several of the cases, the Court has posed but left unanswered the question of whether even a specific and perfected adverse lien can serve as an exception to the absolute priority accorded claims of the United States by the terms of Revised Statutes, Section 3466. *United States* v. *Texas*, 314 U. S. 480, 485–486; *New York* v. *Maclay*, 288 U. S. 290, 294; *Spokane County* v. *United States*, 279 U. S. 80, 95; *Michigan* v. *United States*, 317 U. S. 338, 341. "This Court has never actually held that there is such an exception." *United States* v. *Gilbert Associates*, 345 U. S. 361, 365. In each instance, the Court has found it unnecessary to reach and decide the question, having concluded that the adverse lien was not sufficiently specific and perfected.

States, 279 U. S. 80; *United States* v. *Oklahoma*, 261 U. S. 253; *Thelusson* v. *Smith*, 2 Wheat. 396; *Field* v. *United States*, 9 Pet. 182; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; cf. *United States* v. *New Britain*, 347 U. S. 81; *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47; *Massachusetts* v. *United States*, 333 U. S. 611; *Illinois* v. *United States*, 328 U. S. 8. To be "specific," the adverse lien must, among other requirements, attach to particular items of the debtor's property. *Illinois* v. *Campbell*, *supra*, pp. 373, 375–376; *United States* v. *Waddill Co.*, *supra*, p. 359; *United States* v. *Texas*, *supra*, p. 485. To be "perfected," the lien must be enforced at least to the point of divesting the debtor of either title or possession. *United States* v. *Gilbert Associates*, *supra*, pp. 365–366; *United States* v. *Security Tr. & Sav. Bk.*, *supra*, p. 51; *Illinois* v. *Campbell*, *supra*, pp. 375–376; *United States* v. *Waddill Co.*, *supra*, 357–360. Whether an adverse lien has become sufficiently specific and perfected to overcome the federal priority presents, of course, a federal question. The priority established by Congress in favor of the United States may not be impaired by state legislation or state court decisions creating interests in the debtor's property in favor of third parties. *United States* v. *Gilbert Associates*, *supra*; *Illinois* v. *Campbell*, *supra*, p. 371; *United States* v. *Waddill Co.*, *supra*, p. 357. See also *United States* v. *Security Tr. & Sav. Bk.*, *supra*, p. 49; *United States* v. *New Britain*, *supra*.

No claim is or can be made here that the tax lien of the City of Dallas had become specific and per-

fected prior to the debtor's insolvency. On the contrary, as the court below noted (Pet. 20), it is stipulated that the City had only a "general lien" upon all of the debtor's property. Moreover, no steps to enforce its lien had been taken, the property being taken over and sold by the receiver. The City's claim to priority of its tax lien over that of the United States rests essentially on the theory, rejected by this Court, that liens created by state law, even though inchoate, are paramount to federal tax claims against an insolvent taxpayer.

2. Far from alleging conflict with any decision of this Court or of any of the Courts of Appeals, the City merely asserts (Pet. 8–11) that the court below failed to follow its own decisions. But even if the decisions of that court are not in harmony with each other, that would not furnish sufficient basis for review by this Court (cf. *Wisniewski* v. *United States*, 353 U. S. 901); and, in any event, its decision in this case is in accord with the controlling decisions of this Court. As for the City's contention (Pet. 11–13) that the decision below is not in accord with Texas court decisions, the contention disregards the repeated holdings of this Court that the question of the relative priority of federal and local tax claims is one of federal law. The City's suggestion (Pet. 13–14) that Section 3466 has no applicability here is patently without merit. See *United States* v. *Gilbert Associates*, supra, pp. 365–366; *Illinois* v. *Campbell*, *supra*; *United States* v. *New Britain*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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